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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-817

JOSEPH GAMBINO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 23, 1973

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UNITED STATES OF AMERICA

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The petitioner Joseph Gambino respectfully prays that a writ of certiorari issue to review the judgment entered in this proceeding on September 26, 1973, by the United States Court of Appeals for the Second Circuit.

OPINION BELOW

No opinion was rendered by the Second Circuit. On the appeal, the judgment of conviction entered by the United States District Court for the Southern District of New York was affirmed in open court immediately following the oral argument on September 26, 1973. The judgment of affirmance is reported at 483 F.2d 1399 and is reprinted in the appendix hereto. No opinion was rendered by the District Court.

JURISDICTION

The Second Circuit on September 26, 1973, affirmed a judgment of conviction entered on April 17, 1973, in the Southern District of New York. The petitioner had been convicted, after a jury trial, of having falsely represented to an F.B.I. agent that he was a citizen of the United States, in violation of 18 U.S.C. § 911.

On timely application, Mr. Justice Marshall on October 23, 1973, signed an order extending the time for filing this petition for certiorari to and including November 24, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an alien is denied his right to a fair trial under the Fifth Amendment when the Government without explanation delays for about five years indicting and trying the alien, who had difficulties with the English language, on charges that he falsely represented in English that he was an American citizen.

2. Whether an alien, convicted of having falsely represented that he was a citizen while conversing in English with an F.B.I. agent in 1967, is entitled to a new trial under Rule 33, Fed. Rules Crim. Proc., on evidence that (a) the 1967 conversation had been overheard by a third person, a fact unknown at the time of trial, (b) the third person's version of the conversation fully supported the alien's claim of language difficulties, and (c) recently uncovered Government tapes of contemporaneous immigration hearings also supported the claim of language difficulties.

STATUTE AND RULE INVOLVED

Section 911, Title 18, United States Code:

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned no more than three years, or both.

Rule 33, Federal Rules of Criminal Procedure:

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. . . .

STATEMENT OF THE CASE

A. The proceedings below

On June 1, 1972, the petitioner was indicted in one count for a violation of 18 U.S.C. § 911. The indictment read in full as follows:

> On or about the 8th day of June 8, 1967 in the Southern District of New York, JOSEPH GAMBINO, the defendant, unlawfully, wilfully, knowingly and falsely represented himself to be a citizen of the United States, in that in the course of an official interview of said defendant conducted by Special Agent Edwin C. Taylor, Federal Bureau of Investigation, the defendant falsely stated that he had become a citizen of the United States in 1960, whereas in truth and in fact, as the defendant then and there well knew, he was not then and had never previously become a citizen of the United States.

It is thus apparent that the indictment was returned about seven days before the five-year limitations period expired.[1] That fact led to the filing of a pre-trial motion to dismiss the indictment, wherein petitioner alleged "that the hiatus between the crime alleged and the filing of the Indictment violated his rights under the Fifth and Sixth Amendments to the Constitution of the United States and has rendered a fair trial impossible." An evidentiary hearing was requested so that petitioner might be accorded an opportunity to demonstrate that "actual prejudice" had resulted from "this inordinate delay." This motion to dismiss the indictment was denied by the District Court and the denial was affirmed on the appeal to the Second Circuit.

A four-day jury trial took place in January and February of 1973. Petitioner was found guilty as charged. On April 17, 1973, he was given a one year suspended sentence and fined $750. The judgment of conviction was affirmed by the Second Circuit on the appeal.

Also affirmed by the Second Circuit was the denial by the District Court of petitioner's motion for a new trial on grounds of newly discovered evidence. That motion had been filed on the date of sentencing pursuant to Rule 33 of the Federal Rules of Criminal

---

[1] In non-capital cases, "no person shall be prosecuted, tried, or punished for any offense . . . unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U.S.C. § 3282.

Here, the trial evidence showed that the alleged offense occurred on June 7, 1967, while the indictment was returned on June 1, 1972. It is apparent from the record that the Government became aware of petitioner's false statement about six months to a year after the June 1967 interview by the F.B.I. agent.

Procedure. One of the allegations in that motion was that only after the trial was it discovered that one of petitioner's fellow employees had been present at the June 7, 1967, interview between petitioner and the F.B.I. agent and had overheard the entire conversation. The accompanying affidavit of that individual stated that petitioner at that time had extreme difficulty speaking and understanding the English language. It was also alleged that recently uncovered tapes of a contemporaneous immigration hearing supported the claim as to petitioner's 1967 language difficulties.

B. The evidence at trial

The Government's main witness at the trial was Special Agent Edwin Taylor of the F.B.I. He testified that he had interviewed the petitioner Gambino on June 7, 1967, in connection with an F.B.I. investigation into private garbage collection in Westchester County, New York. Petitioner at that time was employed as a manager of a garbage transfer station.

Taylor testified that he had asked petitioner various questions about his job and his personal background. He claimed that petitioner's responses included statements that he was born on December 24, 1932, in Palermo, Sicily, that he entered the United States in 1954, and that he became a United States citizen in 1960. Tr. 53.

The prosecution and the defense joined in offering into evidence Taylor's typewritten report of his interview, the report having been dictated on June 9, 1967. The report stated:

> Joseph Gambino, also named Giuseppe Gambino, advised he manages the garbage transfer station at Mount Vernon, New York, for James

Plastina, who presently is in poor health. He advised he is frequently assisted on a gratuitous basis by Donato Limitone, operator of Bronx River Haulage. He said he maintains his present position primarily through a longtime friendship and association with Plastina, having assisted him as a bulldozer operator when Plastina operated a dumping area in the vicinity of Gun Hill Road in the Bronx, a few years ago.

Gambino stated he receives a salary of $210.00 a week from Plastina and many times put in a total of 13 hours a day.

Gambino furnished the following information concerning himself:

He was born December 24, 1932, Palermo, Sicily, and came to the United States through New York City, in 1954. He became a citizen in 1960. He presently resides at 331 First Street, Yonkers, New York (same address as Bronx River Haulage). He is married to Francis Gambino, nee Costello, whose family is deceased, but originally came from Yonkers. Her father's name was Angelo Costello. He has no children and has no relatives in the United States.

He leads a quiet life and is home every evening. He has no hangouts or places he frequents. He has never been arrested.

Taylor further testified that his conversation with the petitioner during this interview was entirely in English, that he had no difficulty understanding petitioner, and that petitioner never indicated any difficulty in understanding him. Taylor also stated that the petitioner spoke "very good English" with a "slight Italian accent." Tr. 58. The Government also offered, in establishing petitioner's ability to speak English, written transcripts of petitioner's statements

in English to the Immigration and Natunalization Sesvice made some three months after the June 1967 interview with Taylor. But no tapes of those hearings were offered.

The prosecution and the defense thereupon stipulated to the critical fact that the petitioner was not then, and has never been, a citizen of the United States either through birth or naturalization. Petitioner's contrary statement to Taylor that he was in fact a naturalized citizen constituted the crime charged in the indictment. In addition, though not relevant to the charge, the evidence showed that various other misstatements had been conveyed by petitioner during the interview: (1) petitioner was in fact born on January 20, 1930, rather than on December 24, 1932, as stated to Taylor; (2) petitioner was not married at the time of the interview, but was in fact married some eight days later; (3) petitioner entered the United States through Norfolk, Virginia, rather than through New York City; and (4) petitioner did have, contrary to his statement to Taylor, relatives living in the United States.

The crux of petitioner's defense at the trial was that he had difficulty understanding and speaking the English language and that he did not willfully make any of the foregoing false statements. The petitioner took the stand and testified that he had not knowingly told Taylor that he was a United States citizen; and he denied giving Taylor a false birth date, or telling Taylor he was married, or telling Taylor that he entered the United States through New York City, or telling Taylor that he had no relatives in this country. Tr. 257, 276, 277.

Various defense witnesses, including petitioner's immigration attorney, testified at length about petitioner's difficulties with the English language. He was said to have particular difficulty with verbal tenses, and questions put to him had to be short and in simple language. Tr. 202. The defense also offered in evidence tape recordings of petitioner's English testimony at a June 1970 immigration hearing, which showed his difficulties with the English language. Tr. 158-197.[2]

In charging the jury, the court stated that, to find the petitioner guilty of a violation of 18 U.S.C. § 911, four elements had to be found proved beyond a reasonable doubt: (1) that on the date in question the petitioner was interviewed by Taylor, who had a right to inquire as to petitioner's citizenship; (2) that during that interview the petitioner told Taylor that he was a citizen of the United States; (3) that the petitioner was not then a citizen of the United States; and (4) that the petitioner made the false statement "willfully and deliberately." Tr. 364-365. Nothing was said in the charge, however, about petitioner's claim or evidence relative to his difficulties with the English language.

The jury found the petitioner guilty as charged. In so doing, the jury obviously believed the Government evidence that petitioner sufficiently understood

[2] At one of the various immigration hearings, held on February 27, 1969, petitioner's use of English was so bad that the Special Inquiry Officer said: "Gentlemen: At this point, I think it might be advisable to use the services of an official interpreter in the Italian language for purposes of clarity. Although I believe the respondent understands the questions that are being asked of him, his responses may create some difficulty in the event the record is to be transcribed and reviewed."

the English language to be able to make a willful false statement to Taylor regarding his American citizenship. Just as obviously, the jury rejected the defense testimony that the purported question and answer regarding citizenship were so overlaid with petitioner's misunderstanding of the English language as to deprive the false answer of any willfulness.

C. The new trial motion

The motion for a new trial, filed under Rule 33 and denied on the date of sentencing, claimed that there was newly discovered evidence of three varieties:

(1) Prospective testimony by one Carlo Conti. In an attached affidavit, Conti claimed that he had worked alongside petitioner for twelve years and had found it "extremely difficult" to speak to petitioner in English without groping for words and rephrasing sentences in the most elementary manner. More importantly, Conti alleged that:

> 3. On June 8, 1967, while we were working, repairing a truck, a man came to speak to Joe. I was working a few feet from the place where they spoke and heard the entire conversation. The man identified himself as F.B.I. Agent Ed Taylor. He only stayed long enough to ask Joe for his name, his address and what his job was. Joe had difficulty understanding what the man was asking and it took several minutes for Agent Taylor to elicit even three simple responses.
>
> 4. Although I recently heard that Joe had been the defendant in a trial, it was not until several weeks after the completion of the trial that I told Joe that I had overheard the conversation.
>
> 5. During the many years I have been acquainted with Joseph Gambino, I have found him

> to be extremely honest and truthful and have never heard it said that he was otherwise.

(2) Prospective testimony by one Frank Garofolo. In an accompanying affidavit, Garofolo stated that he had been a neighbor of petitioner for ten years past and knew him well. In the words of the affidavit,

> 4. Joe has never been able to speak English with any fluency at all. His accent is very heavy and always made it difficult for me and others to understand what he was saying and, of course, it is extremely difficult for him to understand us. Usually, when we spoke, it would be in Italian, as speaking in English was almost impossible. Even today when I speak with Joe, most of our conversations are in Italian. . . . Despite the fact that he could barely speak or understand English, he is a man greatly respected and trusted in the community, both for his honesty and sincerity.

(3) The failure of the Government to produce tapes of the 1967 immigration hearings, held soon after the F.B.I. interview, the written transcripts of the hearings having been introduced by the Government to show that petitioner understood and spoke English with little difficulty. In an accompanying affidavit, petitioner's newly substituted counsel alleged that, contrary to the Government's trial testimony, tape recordings had been made of these hearings, and that the Government had not at any time produced such recordings despite a request therefor. Having obtained and listened to the tapes, counsel stated in his affidavit that

> . . . the transcripts do not contain what actually occurred. The transcripts are deficient in the following ways:

5. First, they fail to show the heavy accent with which the defendant speaks. Second, they fail to show the great hesitation between question and answer. Third, they often rephrase into proper English what the defendant says. The tapes themselves are deficient in that the Hearing Officer shuts off the machine whenever a question is being explained to the defendant, either in English or in Italian. Therefore, the tape of the hearing only contains the questions and the final answer, completely overlooking any explanation or help that the defendant might require.

6. In reading the trial transcript, it is clear that much of the Government's case was based on testimony which showed that the defendant could easily understand English and spoke it with little difficulty. Had these tapes been made available to the defendant or his attorney or had the Government even given notice that these tapes existed, it is my belief that the charge against the defendant would have been dismissed. The tapes clearly indicate that the defendant does not speak nor understand English in any meaningful way.

REASONS FOR GRANTING THE WRIT

The grant of certiorari is here appropriate not alone because of the intrinsic importance of the questions presented. A grant is also appropriate because those questions arise in the context of a unique and potentially discriminatory kind of prosecution. Unless the legal concepts embodied in the questions are carefully assessed in the light of their use to secure the conviction of this petitioner, a most dangerous and discriminatory precedent may have been set by the judgment below.

At the heart of this case is the short but virtually limitless proscription of 18 U.S.C. § 911. That statute visits a felony conviction on any alien who "falsely and willfully represents himself to be a citizen of the United States." It matters not what the purpose, the circumstance or the impact of the false representations may be.[3] It is enough if the representation be found false and deliberately made. As this case illustrates, it thus becomes possible to impose imprisonment or a fine or possibly even a resulting deportation upon a confused alien who makes a false and willful representation solely because his foreign origin makes it difficult to communicate accurately in the English language.

This potential of applying § 911 so as to discriminate against inarticulate aliens, a potential that may well have become a reality in this case, overlaps the questions herein presented and augments the appropriateness of granting review of those questions.

1. An important question is raised as to whether the pre-indictment delay caused substantial prejudice to petitioner's right to a fair trial.

This case raises an important aspect of the problem reserved by this Court in *United States* v. *Marion*, 404 U.S. 307, 324-325 (1971):

> . . . the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-

[3] Section 911, which is a 1940 recodification, omits the requirement in the predecessor statute, 8 U.S.C. § 746 (1940 ed.), that the false representation as to citizenship be uttered "for any fraudulent purpose whatever." Under § 911, it is enough that the representation is voluntarily and deliberately made. *Chow Bing Kew* v. *United States*, 248 F.2d 466, 469 (9th Cir. 1957).

> indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused . . . However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases.

The instant case provides the opportunity for rendering one of such "delicate judgments" that will illuminate the path for measuring the prejudicial impact of pre-indictment delays on the right to a fair trial. Here the indictment was returned one week before the expiration of the five-year statute of limitations,[4] a fact which may dilute any speedy trial claims under the Sixth Amendment. *United States* v. *Ewell*, 383 U.S. 116, 120 (1966); *United States* v. *Marion, supra*, 322. But the record in this proceeding contains several ingredients that can contribute to the development of the due process standards adverted to in the *Marion* opinion:

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[4] The applicable statute of limitations, 18 U.S.C. § 3282, was amended in 1954 to increase the limitations period from three years to five years. Act of Sept. 1, 1954, 68 Stat. 1145. Thus the indictment here would have been barred under the earlier three-year limitations period. See *United States* v. *Anzalone*, 197 F 2d 714, 715 (3rd Cir. 1952).

(1) No explanation has been offered by the Government for the inordinate delay of nearly five years in bringing an indictment for an offense that should and could have been quickly detected.[5] Indeed, the gap between the making of the false representation (June 7, 1967) and the start of the trial (January 30, 1973) was nearly five years and eight months. Such a delay in charging and trying an alien for such a stale offense bears the marks of prosecutorial negligence, and perhaps indicates that the bringing of the indictment was at least a prosecutorial afterthought if not a subterfuge for prosecuting an alien thought to be undesirable for other non-indictable reasons.

(2) The lengthy delay by the Government would appear to have created substantial and inevitable prejudice to petitioner's capacity to prepare and present a defense premised upon his difficulties with the English language at the time of the critical F.B.I. interview in June of 1967. While petitioner had been resident in the United States for over a decade preceeding that interview, his claim was that by 1967 his ability to communicate intelligently in English had still not been achieved. And during that 1967 interview, he may have misinterpreted the F.B.I. agent's questions, or he may have been misinterpreted by the agent.

Thus it was essential that the jury be given the most definitive means of ascertaining petitioner's

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[5] The Government actually became aware of the falsity of the representation about six months to a year following the June 1967 interview. In any event, naturalization records are at all times within the possession and control of the Government and could have been checked at any time to discover if petitioner had in fact become a naturalized citizen.

fluency, or lack thereof, in the English language as of June of 1967. And the most definitive means was for the jury to hear him speak on the witness stand, as he did in the trial below, at a time as close to June of 1967 as the interests of prompt prosecution will allow. The longer the delay between the 1967 interview and the time of trial, the more difficult it became for petitioner to attempt to reconstruct his 1967 language difficulties and the less likely it became that the jury could render a trustworthy assessment of those 1967 difficulties. By 1973, in other words, petitioner's articulation of the English language may have so improved that the jury would find incredible any defense based on a vastly different language facility five years ago.

The question remains whether the bringing of the indictment and the start of the trial some five years after a particular point in an alien's language development constitute prejudice of a most substantial and inherent nature. Petitioner's increasing facility with the language over those five years may well be in direct proportion to the decline in petitioner's due process right to present his most effective defense.

The English language problem is one that confronts many aliens, English often being described as the most difficult of all languages to acquire. When aliens are accused of crimes that turn solely on their understanding and use of that language, prompt prosecution may be essential to enable a judge or jury to make a trustworthy assessment of their language facility at the critical point in time. Perhaps no other type of crime or defense requires so prompt an assessment. It is in that context that certiorari becomes appropriate to explore the due process con-

tours of a pre-indictment and pre-trial delay in prosecuting a charge under 18 U.S.C. § 911.

2. An important question is raised under Rule 33 as to the standard to be applied in assessing newly discovered evidence submitted in support of the motion for a new trial.

In submitting his motion for a new trial on grounds of newly discovered evidence, petitioner was not guided by any definitive standard emanating from this Court for assessing such a new trial motion. And in the summary rejection of the motion in the proceedings below, the courts were likewise acting without definitive guidance from this Court. The time has now arrived for that guidance to be supplied.

It has generally been assumed that a motion under Rule 33, Federal Rules of Criminal Procedure, in order to secure a new trial on the basis of newly discovered evidence, must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal or different result; and (4) that the failure to learn of the evidence was due to no lack of diligence on the defendant's part. See Wright, Federal Practice and Procedure, Vol. 2, § 557, p. 515 (1969). The lower federal courts have generally followed those criteria, as presumably did the courts below in this case.

But this Court has refrained from sanctioning or approving those criteria, particularly that part which requires that the new evidence probably produce an acquittal or a different result. Thus in *United States* v. *Johnson*, 327 U.S. 106, 111, n. 5 (1946), with express reference to those criteria, the Court found

that it "need not consider what criteria should have guided the court in passing on the [new trial] motion." A similar reservation as to those criteria is found in *Mesarosh* v. *United States*, 352 U.S. 1, 9 (1956).

At the same time, but without specific reference to the criteria established by the lower courts, this Court in *Griffin* v. *United States*, 336 U.S. 704, 708-709 (1949), seemingly created a criterion for testing a new trial motion which is totally inconsistent with any requirement that the newly discovered evidence "probably produce an acquittal." The Court there remanded the case to the lower court to consider

> . . . whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.

It should be noted that this formulation of the criterion was made despite the Government's reliance in that case on the lower court rule that the evidence must be such as would probably produce an acquittal or a different verdict. Brief for the United States, p. 20, No. 417, Oct. Term 1948.

Thus the basic unanswered question in the instant case is whether the newly discovered evidence submitted by petitioner should be judged by one of the two following criteria: (1) would that evidence, if submitted to the jury, probably have produced an acquittal or a different result? or (2) would it be "too dogmatic" to conclude "that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before

it"? It would seem obvious that the first criterion requires a much higher standard of proof by the defendant and a much higher degree of speculation by the court than is true of the second or *Griffin* criterion.

One or the other of those criteria must be applied to the evidence submitted by the petitioner in this case, evidence which showed:

(1) After trial, petitioner discovered a witness who had overheard the critical F.B.I. interview in June of 1967. This witness had never advised petitioner that he had overheard the conversation until after petitioner's trial and conviction. And the witness' version of what he overheard differed greatly from the F.B.I. agent's version, in that the witness heard the agent ask only three simple questions (name, address and job but not citizenship) and in that the witness heard petitioner's difficulty in understanding those questions and making responses thereto. See *Amos* v. *United States*, 218 F.2d 44 (D.C. Cir. 1954), granting a new trial where "a disinterested witness becomes available who can supply evidence of vital importance and the only similar evidence at the trial was that of the defendant himself."

(2) After trial and after the Government's denial that any such tapes existed, petitioner's counsel discovered tapes of immigration hearings held soon after the F.B.I. interview in 1967, a hearing which clearly revealed petitioner's language difficulties at that critical period. See *Brady* v. *Maryland*, 373 U.S. 83, 104 (1963); *Barbee* v. *Warden*, 331 F.2d 842, 847 (4th Cir. 1964), holding that where the contents of a written report have been withheld "One cannot

possibly say with confidence that such a defect in the trial was harmless."

These, then, are the elements present in this record relevant to a definitive articulation of the Rule 33 standard for obtaining a new trial on the basis of newly discovered evidence. The problems involved in evaluating Rule 33 motions are plainly important and recurring. They deserve prompt consideration by this Court.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted and the judgment below reviewed.

Respectfully submitted,

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Counsel for Petitioner

November 23, 1973

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of September, one thousand nine hundred and seventy-three.

Present: HON. LEONARD P. MOORE
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges,

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

JOSEPH GAMBINO, *Defendant-Appellant.*

73-1916

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

BY VINCENT A. CARLIN
Chief Deputy Clerk

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SUPREME COURT, U. S.

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JOSEPH GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-817

JOSEPH GAMBINO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial because the indictment was returned a week before the five-year statute of limitations expired, and that the district court erred in denying his motion for a new trial based on allegations of newly discovered evidence.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of falsely representing to an agent of the FBI that he was a citizen of the United States, in violation of 18 U.S.C. 911.[1] Petitioner was given a one year suspended sentence and fined $750 (Pet. 4). The court of appeals affirmed without opinion (Pet. App. 1a).

[1] 18 U.S.C. 911 provides:

> Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both.

On June 7, 1967, an FBI agent interviewed petitioner in connection with an investigation into private garbage collection in New York (T. 49-51).[2] (Petitioner at that time was the manager of a garbage transfer station.) The agent questioned petitioner as to his personal background. Petitioner replied that he had been born in Palmero, Sicily, on December 24, 1932; that he entered the United States through New York City in 1954; that he was married to Frances Gambino, whose maiden name was Costello; that he had no relatives in the United States; and that he had become a United States citizen in 1960 (T. 53-54). Petitioner admits that none of these statements was true and that he was not then, and never has been, a citizen of the United States (Pet. 7).

Petitioner testified that he did not knowingly make any of these false statements (T. 257, 276, 277). He also presented evidence of his inability to use or comprehend the English language effectively (T. 158-159, 202-203, 316-319). He claimed that any misunderstanding between the FBI agent and himself was a consequence of that lack of fluency in English. However, the agent testified that his conversation with petitioner was wholly in English, that he had no difficulty in understanding him, that petitioner never indicated any difficulty in understanding the agent, and that petitioner spoke "very good English" with a "slight Italian accent" (T. 58).

1. Petitioner contends that he was denied a fair trial because the indictment was returned a week before the five-year statute of limitations expired. In *United States* v. *Marion*, 404 U.S. 307, this Court indicated that in some circumstances pre-indictment delay might lead to a denial of due process, but that absent a showing of actual

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[2] "T." refers to the transcript of the trial.

prejudice in the conduct of the trial or intentional delay by the government to gain a tactical advantage, no such denial is present. Petitioner here, as did the appellees in *Marion*, "rel[ies] solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost." *Id.* at 325-326. Since there is no showing here that the period of delay resulted in actual prejudice or was a deliberate tactic of the government, no due process claim has been made out.

The essence of petitioner's complaint is that the delay caused such a change in petitioner's ability to understand English that the jury would disbelieve his defense that he misunderstood the FBI agent's questions. However, the trial record provided a substantial basis for the district judge to conclude, as he did, that petitioner was not prejudiced by the delay. The evidence against petitioner was compelling. Apart from the agent's testimony concerning his conversation with petitioner, the government presented evidence of similar acts of deception by petitioner with regard to his background.

(1) In a sworn statement to the Immigration and Naturalization Service three months after the FBI interview, petitioner admitted to having worked under an alias because he was "not here legally" and was "afraid" (Government Ex. 2, p. 2; T. 95). (2) In January 1960, petitioner applied for a social security card under his own name, but listed an incorrect birthdate (Government Ex. 4; T. 105). (3) In November 1960, petitioner applied for a social security card under an alias, listing another false birthdate (Government Ex. 5; T. 106). He admitted in 1969 that he falsified his birthdate on that application because he was afraid of being apprehended by the immigration authorities (Government Ex. 11; T. 146).

(4) Between 1960 and 1964, petitioner lived at several different New York addresses under an alias (Government Ex. 13; T. 300). (5) In 1964, petitioner signed an apartment lease under another alias and represented to his landlady for several years that it was his real name (T. 108-141).

The government also offered, in corroboration of the FBI agent's testimony about petitioner's ability to speak English, portions of testimony given by petitioner at an immigration inquiry in September 1967, about three months after the FBI interview. The transcripts demonstrate petitioner's ability to speak and comprehend English at about the time he misrepresented his citizenship (Government Ex. 2; T. 95). In addition, tape recordings of other immigration hearings were available to defense counsel, and at trial he played for the jury a portion of one from June 25, 1970 (T. 316, 318).

2. Petitioner contends that the court erred in denying his motion for a new trial based on allegations of newly discovered evidence. The new evidence consisted of three items: (1) prospective testimony of Carlo Conti, who allegedly overheard the agent's conversation with petitioner; (2) prospective testimony of Frank Garofolo, who would testify as to petitioner's problems with English and reputation for honesty; and (3) alleged tape recordings of an immigration hearing held in 1967, which would demonstrate petitioner's difficulty with English. The motion was properly denied in the circumstances.

Petitioner offers no explanation of why the two witnesses, whose affidavits indicate they had known petitioner for over ten years (Pet. 9, 10), had not been produced at trial. Carlo Conti stated in his affidavit that he worked alongside petitioner for twelve years and was working a few feet away at the time of the FBI interview. The

other prospective witness, Frank Garofolo, was a neighbor of petitioner for ten years. In these circumstances, it was incumbent upon petitioner to explain why Conti and Garofolo could not have testified at trial. Furthermore, in light of the overwhelming evidence against petitioner, the district court properly concluded that the additional evidence would not have affected the verdict. Findings by trial courts on motions for a new trial based on newly discovered evidence will not be disturbed on appeal except in the most extraordinary circumstances. *United States* v. *Johnson*, 327 U.S. 106. No such extraordinary showing has been made here.

The alleged tapes of the 1967 immigration inquiry do not exist. The hearing was never tape recorded. The immigration reporter testified at trial that the inquiry was taken down on a stenotype machine, and the originals of his paper tapes were introduced at trial (T. 91-95). Counsel who prepared the motion for a new trial was not trial counsel,[3] and he may have confused the 1967 inquiry with the 1970 hearing. It is the 1970 hearing that was taped, and portions of that tape were introduced by the defense at trial (T. 318). The reason for the confusion is clear; counsel never listened to the tape recordings himself, but "had a student assistant listen to the tapes and compare them with the transcripts which were supplied to us" (Motion for a New Trial, Clerk's Record 8, Exhibit A, p. 2). Furthermore, the date of the hearing in question is not mentioned in the motion for a new trial.

The assertions in the petition that tape recordings exist and that they reveal difficulties with English not revealed in the written transcript (Pet. 10-11) are based upon the motion for a new trial and therefore represent the unsworn opinion of a student assistant of petitioner's

[3] See Transcript of Sentencing, April 17, 1973, pp. 380-382, 384.

counsel at that time. We further note that the issue of tape recordings was not mentioned in petitioner's court of appeals brief, and should not be heard now. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-817

JOSEPH GAMBINO, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR REHEARING

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June 7, 1974

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PETITION FOR REHEARING

On May 13, 1974, this Court denied the petition for writ of certiorari that was filed in this proceeding. For the reasons herein set forth, the petitioner respectfully requests a rehearing of that denial, to the end that a writ issue to review the judgment entered by the Second Circuit on September 26, 1973.

The issues presented in the petition for certiorari were twofold: (1) whether an alien is denied his Fifth

Amendment right to a fair trial when the Government without explanation delays for nearly five years indicting and trying the alien for having made false representations to an F.B.I. agent that he was an American citizen, in violation of 18 U.S.C. § 911, and (2) whether an alien, having been convicted of making such false representations, is entitled to a new trial on the basis of newly discovered evidence that supported the alien's defense that he had had language difficulties in understanding the F.B.I. agent when interviewed more than 5 years earlier.

As the petition emphasized (pp. 11-12), the very fact that petitioner appeared to be a confused alien, who allegedly had difficulty communicating in English, made it essential to treat those two issues with extreme care. When an alien's ability to understand the English language becomes the focal point of an alleged crime, the most mundane of applicable constitutional and legal concepts can easily become vehicles for discrimination against the alien.

This petition for rehearing is confined, in the terms of Rule 58(2), "to other substantial grounds available to petitioner although not previously presented." As so confined, however, re-emphasis must be given to the potential of discrimination against aliens that pervades every issue and every ground for certiorari in this case. To be specific about the "other substantial grounds . . . not previously presented":

(1) As to the due process aspects of the Government's long delay in securing an indictment and bringing petitioner to trial, another ground for certiorari exists in the previously unasked question: Is the probability of prejudice so great in delaying an indictment

and trial of an alien, accused of having made a misrepresentation in a language he had difficulty understanding, that identifiable prejudice resulting from the delay need not be shown?

The petition and the Government's opposition dealt only with the showing of identifiable prejudice. But the first question presented in the petition necessarily encompasses the possibility that this may be one of those procedures employed by the Government that "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes* v. *Texas*, 381 U.S. 532, 542-543 (1965). Inherent lack of due process, requiring no showing of identifiable prejudice, has been found by this Court in such matters as an unfair tribunal (*In re Murchison*, 349 U.S. 133, 136 (1955)), undue pretrial publicity (*Rideau* v. *Louisiana*, 373 U.S. 723 (1963)), and lack of counsel (*Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963)).

Certiorari thus becomes appropriate to determine if an unexplained delay in indicting and trying an alien under these circumstances, where the delay necessarily diminishes the ability to reconstruct the language difficulties as of the time of the offense, is inherently lacking in due process.

(2) As to the second question, dealing with the right to a new trial on grounds of newly discovered evidence, it may also be true that an allegedly inarticulate alien should not be held to so high a standard respecting newly discovered evidence as befits an ordinary defendant. Certainly the various standards heretofore employed for testing a motion for a new trial on such evidentiary grounds (see petition, pp. 16-18), should be examined to determine which, if any, applies to a motion filed by an alien in these circumstances.

An additional word, appropriate to this rehearing request, must be added in response to the Government's assertion (Opp. Br. 5) that the alleged tapes of the 1967 immigration inquiry do not exist and that only the 1970 hearing was taped.[1] That assertion simply reflects the Government's trial testimony which counsel's affidavit, submitted in support of the motion for a new trial, was designed to contradict. What has thus developed in the certiorari papers is an unresolved factual dispute over the existence of certain tapes that might well be decisive of petitioner's right to a new trial.[2] Certiorari should be granted so that the matter may be remanded to the District Court for an evidentiary hearing on this tape issue.

The significance of the 1967 tapes, if they exist, is obvious. All that the record now contains is testimony by witnesses as to petitioner's facility with the English language in 1967. But taped recordings of petitioner's use of English in 1967 is clearly the best evidence of that facility. "Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony." *Nixon* v.

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[1] The Government asserts (Opp. Br. 5) that petitioner's counsel who submitted the affidavit may have confused the 1967 inquiry with the 1970 taped hearing. But that affidavit (Ex. A attached to new trial motion) specifically contradicted the testimony of the immigration reporter regarding the manual recording of the 1967 hearing, referring specifically to the transcript page (T. 91) now relied upon by the Government. It may be the Government, rather than petitioner's counsel, who is confused.

[2] Just since the filing of the Government's brief, petitioner's local counsel has discovered the existence of six additional taped immigration hearings held in 1969, the first being dated January 27, 1969.

Sirica, 487 F.2d 700, 718 (App. D.C. 1973). See also *Lopez* v. *United States,* 373 U.S. 427, 437-440 (1963); *Osborn* v. *United States,* 385 U.S. 323, 326-331 (1966).

Finally, contrary to the Government's claim (Opp. Br. 6), the issue of the tape recordings was brought to the attention of the Second Circuit. While the matter was not mentioned in petitioner's brief in that court, all the papers and affidavits concerning the motion for a new trial were part of the certified record lodged in the Second Circuit and were thus before the court. The matter was also referred to during the oral argument in the Second Circuit.

CONCLUSION

For these additional reasons, supplementing and also incorporating those set forth in the petition for certiorari, rehearing should be granted. The order denying certiorari should be vacated and a writ should then issue.

Respectfully submitted,

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June 7, 1974

Certificate of Counsel

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that this petition is restricted to the grounds specified in Rule 58(2).

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